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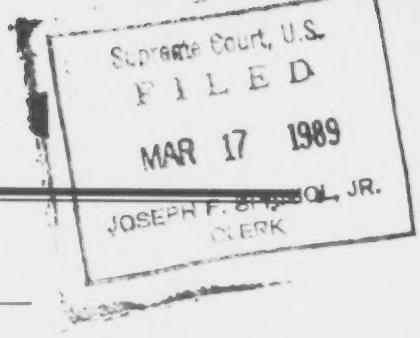

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAFAAT A. RAHMANI,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS 1ST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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March 1989

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QUESTIONS PRESENTED

1. On its face and as applied to the Petitioner, is Houston Municipal Ordinance No. 85-1337 unconstitutionally vague and violative of the First and Fourteenth Amendments to the Constitution of the United States?

2. On its face and as applied to the Petitioner, is Houston Municipal Ordinance No. 85-1337 unconstitutionally overbroad under the First and Fourteenth Amendments to the Constitution of the United States?

3. On its face and as applied to the Petitioner, does Houston Municipal Ordinance No. 85-1337 violate due process of law protections in violation of the Fourteenth Amendment to the Constitution of the United States?

4. On its face and as applied to the Petitioner, does Houston Municipal Ordinance No. 85-1337 violate free speech protections and constitute an impermissible prior restraint on free speech, in violation of the First and Fourteenth Amendments to the Constitution of the United States?

LIST OF INTERESTED PARTIES

1. Rafaat Rahmani, (01-87-00551-CR) - (0499-88)
2. Charles Rice Young, Attorney for Petitioner.
3. Ronnie Beylotte, Assistant City Attorney, City of Houston, Texas.
4. Gilbert Douglas, Assistant City Attorney, City of Houston, Texas.

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RAFAAT A. RAHMANI,
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v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS 1ST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the First Court of Appeals of The State of Texas and the Orders of the Court of Criminal Appeals of the State of Texas, entered November 23, 1988 (Motion for Rehearing denied January 18, 1989) refusing to accept the Petition for Discretionary Review of said opinion.

CITATION TO OPINION BELOW

The Court of Criminal Appeals refused Petitioner's Petition for Discretionary Review by unpublished Orders dated November 23, 1988, under Case Number 0499-88. The official notice is attached as Appendix "A". The Court of Criminal Appeals denied Petitioner's Motion for Rehearing on January 18, 1989. The official notice of the denial is attached as Appendix "B". The opinion of the First Court of Appeals, which is published, was delivered on April 14, 1989 and is attached as Appendix "C".

JURISDICTION

Jurisdiction of this Court is invoked under State Courts; Appeal; Certiorari, 28 U.S.C. § 1257(3) (1984), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involved the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner is accused of operating an adult arcade in the City of Houston. The Petitioner filed a motion to quash which was considered and denied by the Municipal Court. The Petitioner did not present evidence on his own behalf. In a court trial the Municipal Court rendered a verdict of guilty and the Court assessed punishment at a $150.00 fine.

ARGUMENT

VAGUENESS

In the Motion to Quash the Complaint, the Petitioner complained that City of Houston Ordinance No. 85-1337 is, in many particulars, constitutionally infirm and also complained that the complaint accusing him of illegal conduct is likewise, constitutionally infirm.

The Municipal Court overruled the motion and also overruled Petitioner's Motion for New Trial which re-urged the motion to quash.

In a number of specific respects the Ordinance is so open-ended and imprecise in that it provides virtually no ascertainable legal standard at all. Such imprecision in a law regulating presumptively protected First Amendment activities on the basis of the content of motion pictures exhibited is constitutionally insupportable.

The void-for-vagueness doctrine, as applied to criminal statutes, serves two separate and distinct functions. First, it imposes a general requirement of linguistic specificity to assure fair notice to those whose conduct is within the intendment of the law. Secondly, and even more importantly, it demands that sufficiently precise restraints be imposed upon the exercise of discretion by law enforcement authorities to prevent or at least to minimize the potential for arbitrary and capricious official action.

The two separate and distinct considerations have been succinctly articulated by the Supreme Court's decision in *Kolender v. Lawson*, 461 U.S. 352 (1983):

> "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal

> offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. * * * Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recently recognized that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' [Smith v. Goguen, 415 U.S. 566, 574 (1974)]. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections' (citations omitted)." at pg. 357-358.

Moreover, the "general test of vagueness applies with particular force in review of laws dealing with speech * * * [and] '[s]tricter standards of permissible statutory vagueness may be applied to a statute having potentially inhibiting effect on speech'." *Hynes v. Mayor and Council of the Borough of Oradell*, 425 U.S. 610, 620 (1976); see also *Buckley v. Valeo*, 424 U.S. 1, 76-82 (1976); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Criminal statutes or ordinances penalizing "pure speech" (as opposed to conduct alone, or conduct accompanied by speech) are necessarily subject to the most rigorous standard of First and Fourteenth Amendment review. *Winters v. New York*, 333 U.S. 507, 515 (1948). *Smith v. Goguen*, 415 U.S. 566 (1974).

The standard governing what constitutes unconstitutional vagueness is succinctly set forth in *City of Webster v. Signad, Inc.*, 682 S.W.2d 644, 646 (Tex. App.—

Houston [1st Dist.] 1984, writ ref'd n.r.e.): "When persons of common intelligence are compelled to guess at a law's meaning and applicability, due process is violated and the law is invalid. *Texas Antiquities Committee v. Dallas County Community College District,* 554 S.W.2d 924, 928 (Tex. 1977) (holding the term 'of historical interest' to be unconstitutionally vague)." That case further explains that, "a statute or ordinance is violative of due process and fatally vague when persons regulated by it are exposed to some risk or detriment without fair warning of the nature of the proscribed conduct. *Texas Liquor Control Board v. The Antic Club, Inc.,* 457 S.W.2d 41, 45 (Tex. 1970)." *Id.*

Applying those standards to the ordinance at issue in this case, the vagueness problems with Ordinance No. 85-1337 are as follows:

(1) *Is it unlawful to own a business or a building"?* Section 28-81 of the Ordinance defines "an adult arcade" as "any *'premises'* to which members of the public or members of any club, group or association are admitted and permitted to use one or more 'arcade devices' (emphasis added)." In turn, the term "premises" is defined as "a building . . ." Thus, an "adult arcade" is necessarily a "building".

The operative proscriptions of the Ordinance are contained in Section 28-91 thereof, which makes it "unlawful for any person to own, operate, manage or conduct any business in an adult arcade unless there is a permit for the adult arcade." The question is, is it unlawful to own a *building,* or unlawful to own a *business* in a building? That is, is it unlawful to own . . . an adult arcade, operate . . . an adult arcade, manage . . . an adult arcade,

or conduct any business in . . . an adult arcade, or does the ordinance instead prohibit own[ing] . . . any business in (an adult arcade), operat[ing] . . . any business (in an adult arcade), manag[ing] . . . any business (in an adult arcade), or conduct[ing] . . . any business (in an adult arcade)? Self-evidently, the ordinance is completely unclear and the foregoing inquiry is unanswerable by reference to the literal language of the Ordinance.

The case is indistinguishable from and controlled by *Sheppard v. Giebel,* 110 S.W.2d 166 (Tex. Civ. App.—Austin 1937, no writ). In that case, because there was indefiniteness and uncertainty as to "whether it be the owner of the title to such machines, the ones in possession of them, or the person on whose premises they were exhibited", 110 S.W.2d at 171, upon whom the obligations of the statute devolved, the law was declared to be unconstitutional, for contravention of Article I Section 10 of the Constitution of Texas. The present case is indistinguishable in principle from *Sheppard,* and the same result must obtain.

(2) *What is the meaning of "dispensing entertainment"?* The Ordinance (Sec. 28-81 - arcade device) defines an "arcade device" as, essentially, any machine or device "that *dispenses* or effectuates the *dispensing* of entertainment, that is intended for the viewing of five (5) or fewer persons in exchange for any payment of any consideration (emphasis added)." What precisely, if anything, does this mean?

Clearly, the term "dispense" ordinarily connotes a distribution in discrete units. Indeed, that is the dictionary definition of the term "dispense"—that is, "to deal out in portions." For example, a mechanical device that

would "dispense" videotape cassettes—much like a cigarette machine dispenses packages of cigarettes—would clearly come within such a definition.

"Dispensing" is a particular type of distributing, which entails discrete portions being distributed. In that context, the meaninglessness of the term "dispense entertainment", as used in the Ordinance, becomes apparent. "Entertainment" means any live exhibition, display or performance, or any still pictures or movie pictures, however displayed (in which specified sexual activities are depicted). "Distribution" (and therefore dispensing) is a distinct activity from either "performing", "displaying" or "exhibiting". A play can be "performed"; a motion picture can be "displayed" or "exhibited". A play cannot be "dispensed", and neither can a movie picture (except, of course, in the here inapplicable sense of selling the movie itself via some kind of a dispensing machine). These definitions are most usefully explained in the context of copyright law. See, e.g., 17 U.S.C.A. § 106.

In the context of the present case, however, the term "dispense entertainment" is wholly meaningless. Does a traditional movie threater "dispense" movie pictures? Clearly, it does not; it *displays* or *exhibits* them. What, then, distinguishes the operation of a traditional movie theater (which cannot, in any meaningful sense, be said to "dispense entertainment") from the operation of "arcade devices" in the case at bar. Does a television set "dispense" t.v. shows? Again, the answer is self-evident, at least in common usage of the terms, yet no rational explanation justifies a different conclusion with regard to adult arcade devices which are, basically, essentially and merely, coin-operated television sets or movie projectors.

Clearly an *exhibition* or display of motion pictures is not in any meaningless sense equivalent to a dispensation of chewing gum, cigarettes, candy bars or a myraid of other products ordinarily associated with vending machines as such. If, as the City maintains, the devices "dispense" entertainment, the meaning of that term is a mystery.

(3) *What is the meaning of "intended to be viewed by five (5) or fewer persons"?* Even if it can be said that the arcade devices here in issue "dispense" motion pictures, the Ordinance (Sec. 28-81 - arcade device) does not delineate what is meant by the phrase "intended for the viewing of five (5) or fewer persons." First of all, *whose* intent is relevant in this regard? Is it the producer or distributor of the adult videotape or film that is being allegedly "dispensed" in the adult arcade? In particular, if the producer, distributor or exhibitor of an adult film or videotape intended for the *film* to be exhibited ultimately to far more than five people, does this exempt the device displaying the motion picture from the definition of an "arcade device" under the Ordinance?

By the same token, the phrase "intended for viewing by five or fewer persons" does not specify the relevant time frame within which such viewing by such five or fewer persons must have occurred. Does the phrase refer to a movie (or other "entertainment") intended to be viewed by five or fewer persons per day? Does it refer to a movie intended to be viewed by five or fewer persons per showing? Does it refer to a movie intended to be viewed by five or fewer persons in the life of the movie (such as, perhaps, a so-called "home movie")? Does it refer to a movie *intended* to be viewed by no more than five persons at a time (i.e., simultaneously)? This ordi-

nance simply gives no adequate notice of which this cryptic phrase means.

These questions are of extraordinary significance in view of what appears to be the only legal authority concerned with a similar ordinance, i.e., the case of *EWAP, Inc. v. City of Los Angeles,* 158 Cal. Rptr. 579 (Ct. App., 1979). The Californa Court of Appeals sustained against various constitutional and legal challenges a Los Angeles arcade ordinance which specifically was limited to "arcade devices" that "are maintained to show still or motion pictures to five or fewer persons per machine *at any given time*" (emphasis added). 158 Cal. Rptr. at 581, n.1.

The Los Angeles ordinance at least attempted on its face precisely to delimit the regulation to constitutional proportions by specifying precisely both the numbers of persons *and* the time interval of the exhibition. The Houston Ordinance, by contrast, leaves its interpretation entirely to speculation and guesswork.

In a like manner, the Ordinance does not reveal whether the phrase "intended to be viewed by five or fewer persons" refers to the film or to the device. Grammatically, the phrase "that is intended for the viewing of five or fewer persons" modifies "entertainment". In other words, if the movie (or live exhibition) is intended to be viewed by more than five persons, the machine which exhibits it is not an "arcade device" under the Ordinance, irrespective of the characteristics of that machine (i.e., if the machine is only capable of displaying the film, effectively, to five or fewer persons at a time). On the other hand, if for some obscure reason the film is "intended for the viewing of five or fewer persons", the movie projector which displays it is ap-

parently an "arcade device" even if exhibition takes place in a coliseum-sized theater.

The truth of the matter is that what the City *probably* intended to regulate was the display or exhibition of motion pictures in *booths* intended to be occupied by five or fewer persons at a time, irrespective of the intent of the movie maker or the capabilities of the projector. Cf. *Ellwest Stereo Theaters, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir. 1982). But the City of Houston did not do that. What it did was to define an arcade device as a coin-operated machine that "dispenses" entertainment that is intended for the viewing of five or fewer persons. "Courts must take statutes as they find them." *Rudman v. Railroad Commission of Texas,* 162 Tex. 579, 348 S.W.2d 717 (1961). This Ordinance, in its present form, is simply indecipherable.

(4) *What is "an unobstructed view of every area of the adult arcade to which any patron is permitted access"?* Section 28-101(a) of the Ordinance essentially demands that the *building* in which an adult arcade is located provide an unobstructed view of every public area. To the extent that adult arcades in Houston are operated in conjunction with an adult bookstore - adult videotape rental/sales business, such a regulation is self-evidently constitutionally overbroad, as will be hereinafter demonstrated.

For present purposes the question is what is "an unobstructed view"? Virtually any room or other enclosed area of a public facility (such as a courtroom) contains areas "to which [any member of the public] is permitted access" which are not susceptible of unobstructed view from one centralized location within the room. Within the context of the City's attempt to regulate adult arcades,

how rigorously is this standard to be enforced? Theoretically, given the nature of the business premises and the numerous racks or stands upon which adult magazines, books and videotapes are displayed, such a requirement would demand a multitude of individual "managers" to supervise every patron's activity throughout any portion of the establishment, even if only a relatively small proportion of the business was devoted to an adult arcade. The ultimate decision, of course, rests with the "cop on the beat"—in this case, the Chief of Police of the City of Houston, Texas, under Section 28-93 of the Ordinance. Such unbridled discretionary determinations are plainly unconstitutional.

The Ordinance offends both elements of the void-for-vagueness doctrine. On its face the language attempting to define the concept of an "adult arcade" and setting forth the standard with which such an establishment must comply is so imprecise as to provide no fair notice as to what words or conduct would come within its prohibition. See, e.g., *Gooding v. Wilson,* 405 U.S. 518 (1972) ('opprobrious words or abusive language, tending to cause a breach of the peace"); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971) (conduct "annoying to persons passing by"); *Kolender v. Lawson, supra* ("credible and reliable identification"); *Palmer v. City of Euclid,* 402 U.S. 544 (1971) ("wandering" about the streets or being "abroad at late or unusual hours in the night without any visible or lawful business" without being able to give satisfactory account"); *Winters v. New York, supra* (publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime").

Secondly, the open-ended and imprecise language of the Ordinance confers virtually unlimited discretion on the police and other interested City officials to determine what constitutes in any particular circumstances an "adult arcade," thereby entrusting lawmaking "to the moment-to-moment judgment of the policemen on the beat" *Gregory v. City of Chicago,* 394 U.S. 111, 120 (1969) (concurring opinion). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). By failing to specify with any degree of certainty what constitutes an "adult arcade" the Ordinance renders it virtually impossible to determine how the standards applicable to such "arcades" should be applied in any given set of circumstances. Such a standardless procedure is the antithesis of the precision required by the First Amendment.

All of the foregoing vagueness issues are not merely problems of metaphysics or linquistics. The situation presented by Ordinance No. 85-1337 is essentially nonsensical.

OVERBREADTH

Under the First Amendment a law is void on its face for overbreadth if it "does not aim specifically at evils within the allowable area of [government] control but * * * sweeps within its ambit other [constitutionally protected] activities * * *." *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940); *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975); *Sawyer v. Sandstrom,* 615 F.2d 311, 315 (5th Cir., 1980). The Ordinance at issue is not readily subject to a limiting construction that would

confine its application to constitutional proportions; indeed, as demonstrated in this case, it has apparently been consistently applied without such a limiting construction by the City of Houston Municipal Court since its enactment.

The overbreadth of this Ordinance can be demonstrated in a variety of ways. First, the Ordinance provides in Section 28-101(a) that every adult arcade must be configured "in such a manner that there is an unobstructed view [from the manager's station] of every area of the adult arcade to which any patron is permitted access for any purpose." The result of imposing this requirement indiscriminately upon both the arcade and its adjoining bookstore is to effectively preclude the sale of any books, magazines or other merchandise. Eliminating the shelving, racks and stands utilized to display merchandise would necessarily require a drastic reduction in inventory and substantially impede the successful merchandising of the books, magazines, films and video tapes sold. The overbreadth of the Ordinance thus has a direct and substantial impact on activities protected by the First Amendment.

The case of *People v. B & I News, Inc.*, 211 Cal. Rptr. 346 (1984) illustrates the flaw. The arcade ordinance in that case required "the entire premises *wherein the pictures are viewed* to be visible upon entering into such premises" (emphasis added). 211 Cal. Rptr. at 348. By contrast, the Houston Ordinance applies to the *entirety* of the business premises, including the bookstore-newsstand portion of the operation, and if enforced literally would require the store to be closed.

Secondly, the lighting requirements prescribed by Section 28-102 of the Ordinance, if applied to ordinary

non-adult theaters, would make it impossible for such theaters to be operated. The end result of the Ordinance's overbreadth in that regard is essentially to prohibit altogether the operation of a business depending only upon the content of the films exhibited.

Third, as a practical matter, the Ordinance appears to criminalize ownership of any building in which coin-operated devices displaying sexually explicit films are operated. Even though the owner of the building may have no interest in the business being operated, and even though the operation of such business is totally beyond any power of control he might exercise, the Ordinance on its face purports to impose penalties merely upon the status of the owner, rather than upon any conduct in which he himself engages. Criminalizing land ownership because of misuse of the premises by tenants is the quintessence of unconstitutional overbreadth and the antithesis of carefully tailored legislation.

Finally, the Ordinance purports to penalize any person who "conducts any business" in a building in which coin-operated devices exhibiting sexually explicit films are operated. "It does not require a strain of the imagination to envision numerous situations where the Ordinance would officially condemn otherwise constitutionally protected conduct." *Dubuisson v. State,* 572 S.W.2d 694, 698 (Tex. Crim. App. 1978). For example, if two otherwise legitimate businessmen agree at a bookstore having adult arcade devices to meet for a business lunch, they have violated the ordinance. For that matter, anyone who buys a newspaper or a magazine at a bookstore has necessarily conducted business in an adult arcade and thereby apparently violated the Ordinance. A tele-

phone repairman making repairs violates the ordinance as does the mailman delivering mail to the store. Such inhibition on all legitimate and even clearly constitutionally protected conduct, simply because it happens to occur in a place where unpermitted arcade devices are located is so obviously constitutionally infirm that no further discussion nor citation of authority is necessary to demonstrate the obvious truism.

The problem is that, rather than aiming its regulative efforts precisely, the City has simply sought to impose a blanket prohibition on any commercial activity of any kind on arcade "premises". Such a prohibition is significantly and fatally overbroad.

This Ordinance is thus a classic violation of the precept that "any government regulation [of First Amendment rights] must be carefully tailored, so that rights are not needlessly impaired." *United Steelworkers of America v. Sadlowski,* 457 U.S. 102, 111 (1982); *Brown v. Hartlage,* 456 U.S. 45, 53-54 (1982). The United States Court of Appeals for the Fifth Circuit held in *Reeves v. McConn,* 631 F.2d 377, 385 (5th Cir., 1980), in invalidating a City of Houston ordinance restricting sound amplification devices, that "[a]n absolute and city-wide prohibition of all sound amplification except during nine hours of the day cannot be viewed as 'narrowly tailored to further the State's legitimate interest'." In a similar sense this Ordinance reaches a substantial amount of constitutionally protected conduct and cannot conceivably satisfy the requirement of "narrow specifically" demanded in the regulation of freedom of expression. *N.A.A.C.P. v. Button,* 371 U.S. 415, 433 (1963).

DUE PROCESS AND FREE SPEECH

Far from being a "content-neutral" regulation of speech, the express terms of the Ordinance condition regulation solely upon the *content* and *character* of the films exhibited in the adult arcades to which it applies.

The importance of this discriminatory feature of the regulation in question is exemplified in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982). In *Young*, the Supreme Court of the United States sustained Detroit zoning ordinances imposing geographical limitations on the location of adult movie theatres and requiring that they be licensed. As the Court pointed out,

> "It is true * * * that adult films may only be exhibited commercially in licensed theatres. But that is also true of *all* motion pictures. The city's general zoning laws require *all* motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating those ordinances" (emphasis added). 427 U.S. at 620.

The Court sustained the geographical restrictions based upon film content upon a legislative determination that a concentration of "adult" theatres "causes the area to deteriorate and become a focus of crime, effects which

are not attributable to theatres showing other types of films." 427 U.S. at 71, n.34. In the present case, there is absolutely no legislative fact-finding that the deleterious effects sought to be minimized are in any way related to the display of "adult" films in arcades. Logically, such an assumption would be nonsensical; there would seem to be no reason why it would be more difficult to extricate oneself from a burning booth exhibiting a sexually explicit film than from one displaying "Heidi".

Similarly, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) the Court upheld a zoning ordinance similar to that involved in *Young*, crediting legislative and judicial findings that "the location of adult theatres has a harmful effect on the area and contributes to neigborhood blight." 475 U.S. 41.

In the present case, by contrast, the Ordinance before this Court is in no meaningful sense a zoning ordinance and does not in any way regulate the geographical location or density of adult theatres or similar businesses. Instead, the Ordinance purports to promote health and fire safety *only* in establishments exhibiting adult films. All other establishments of a similar configuration, exhibiting non-adult films by means of so-called "arcade devices," are not regulated at all. Thus, rather than being essentially "content-neutral," the Ordinance expressly predicates its regulative proscriptions upon the content of the motion pictures exhibited.

Such discrimination in the context of the First Amendment is both irrational and presumptively unconstitutional. The City's citation of *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir., 1982) demonstrates this flaw. In *Ellwest* the Ninth Circuit upheld a Phoenix,

Arizona arcade ordinance that by its terms applied "to *all* enclosed video viewing booths regardless of the type of film shown. Its reach is not limited to booths in which 'adult' films are displayed." 681 F.2d at 1245, n.2 (emphasis added). Fire safety and public health considerations simply do not demand that only adult movies be subject to ordinance's regulations. Phrased another way, it simply cannot be rationally maintained that an adult arcade otherwise dangerous to the public health or safety can be rendered innocuous simply by changing the character and content of the film images displayed.

The reconfiguration of an adult arcade, as required under the ordinance could effectively require that the business be completely shut down pending the remodeling required by the Ordinance. Such a forced closing, not required of arcades not displaying adult material, constitutes precisely the sort of prior restraint that has been consistently condemned by both the Federal courts and the courts of Texas. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202 (Tex., 1981).

This would be an entirely different case if the City's attempted regulation of arcades were "content-neutral"—that is, dependent only upon the configuration of the booths rather than the content of the films exhibited in them. But such precise, narrowly drawn regulations are not now before this Court. Instead, the City has imposed significant restrictions on the exhibition of *adult* films that have not been imposed upon the exhibition of other motion pictures. Its ostensible reasons for doing so—fire, safety and public health—relate not to content of the films but to the manner of their exhibition, yet no

non-adult arcade is subject to regulation at all. The limitation of this ordinance only to *adult* arcades conclusively establishes that this is not a constitutional valid time, place or manner regulation that can be "justified without reference to the content of the regulated speech * * *." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Accordingly, it is a constitutionally invalid prior restraint on free expression. Moreover, it is arbitrary and irrational since there is no rational basis for regulating configuration and illumination of booths solely on the basis of the character of the films therein displayed. The Ordinance therefore violates due process of law.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner attacked the Ordinance at every opportunity under the First, Fourth and Fourteenth Amendments in the trial court by motions and in the County Court, Court of Appeals and Court of Criminal Appeals in his briefs. The various courts found against the Petitioner.

REASONS FOR GRANTING THE WRIT

This petition for certiorari should be granted for the following reasons:

VAGUENESS — The Court of Appeals has considered Petitioner's facial attack on the ordinance without considering the special status of the Petitioner as a clerk. The Petitioner is the ordinary people for whom the ordinance is supposed to provide notice of conduct proscribed. The ordinance, as applied to clerks, and police officers, e.g., "any person who conducts any business", fails

to provide intelligible notice and direction of the "common usage or understanding" standard under *Kolender v. Lawson*, 461 U.S. 352 (1983).

OVERBREADTH — Is an ordinance overbroad that penalizes any person who conducts any business within a building that houses arcade devices?" The Court should measure whether the ordinance reaches a substantial amount of constitutionally protected conduct", vis-a-vis the clerk-defendant's potential for being victimized by the ambiguities inherent in the ordinance.

DUE PROCESS AND RESTRAINT OF FREE SPEECH — The Court of Appeals has not addressed the requirement under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

CONCLUSION

Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

FITZGERALD, STAEHELY & YOUNG

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3401 Louisiana, Suite 440
Houston, Texas 77002
713/520-1719

Attorney for Petitioner

March 1989
Houston, Texas

APPENDIX A

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

November 23, 1988

COA#: 01-87-00551-CR

RE: Case No. 0499-88

STYLE: Rahmani, Rafaat A.

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail To:

Charles Rice Young
3401 Louisiana, Suite 220
Houston, TX 77002

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

January 18, 1989

COA#: 01-87-00551-CR

RE: Case No. 0499-88

STYLE: Rahmani, Rafaat A.

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail Tto:

Charles Rice Young
3401 Louisiana, Suite 220
Houston, TX 77002

APPENDIX C

Rafaat A. RAHMANI,
Appellant,

v.

The STATE of Texas,
Appellee.

No. 01-87-00551-CR.

Court of Appeals of Texas,
Houston (1st Dist.).

April 14, 1988.

Defendant was convicted in municipal court of operating adult arcade without permit and assessed fine of $150, and he appealed. The Harris County Criminal Court at Law No. 3, Jimmie Duncan, J., affirmed, and defendant appealed. The Court of Appeals, Sam Bass, J., held that ordinance was not unconstitutionally overbroad or vague, or did not constitute impermissible prior restraint to free speech.

Affirmed.

Charles Rice Young, Houston, for appellant.

John B. Holmes, Dist. Atty., of Harris County, Russell Richardson, Asst. City Atty., Houston, for appellee.

Before EVANS, C.J., and SAM BASS and DUNN, JJ.

OPINION

SAM BASS, Justice.

The municipal court convicted appellant of "operating an adult arcade without a permit" and assessed a fine of $150. (Although this case was prosecuted in municipal court, the record reflects that the State, and not the City of Houston, brought the charges.) On appeal to the county criminal court at law, his conviction was affirmed.

We affirm.

Pursuant to Tex. Gov't Code Ann. section 30.278 (Vernon Pamph. 1988), appellant seeks a reversal of the county criminal court decision. The City of Houston and/or the State failed to submit a brief to the county criminal court, and no party requested that a statement of facts be made at trial. Therefore, because section 30.278 limits what is available for appellate review to the briefs and transcript considered by the county criminal court, the record before us is limited.

In his first three points of error, appellant contends that Houston City Code 85-1337 ("the Ordinance") violates the First and Fourteenth Amendments of the United States Constitution. His specific arguments are that the Ordinance is overbroad, "void for vagueness," and that it effects an impermissible "prior restraint" on free speech. Appellant's points of error constitute "facial challenges" because he claims that the law is "invalid *in toto*—and therefore incapable of any valid application." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S. Ct. 1186, 1191 n. 5, 71 L.Ed.2d 362 (1982) (quoting *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S. Ct. 1209, 1223, 39 L.Ed.2d 505 (1974)).

Appellant bases these points of error on specific sections of the Ordinance. Tex. R. Crim. Evid. 204 states that judicial notice may be taken of the ordinances of cities and counties of Texas. All references to the provisions of the Ordinance in this opinion are made pursuant to rule 204. The relevant sections of the Ordinance read:

> Sec. 28-81. *Definitions.*
>
> *Adult arcade* shall mean any 'premises' to which members of the public . . . are admitted and permitted to use one or more 'arcade devices.'
>
> *Arcade device* shall mean any coin or slug operated or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of 'entertainment', that is intended for the viewing of five or fewer persons in exchange for any payment of any consideration.
>
> *Entertainment* shall mean (1) any live exhibition, display or performance, or (2) any still picture(s) or movie picture(s), whether mechanically, electrically or electronically displayed . . . in which the 'specified sexual activities' are depicted.
>
> *Premises* shall mean a building. . . .
>
> *Specified sexual activities* shall mean (1) human genitals in a state of sexual stimulation or arousal, (2) acts of human masturbation, sexual intercourse or sodomy, (3) fondling or other erotic touching of human genitals, pubic regions, buttock or female breast, or (4) any combination thereof.
>
> Sec. 28-84. *Penalties.*
>
> (a) The violation of any provision of this article, including the doing of anything which is herein prohibited or declared to be unlawful or the failure to

do anything or perform any duty which is required herein, shall constitute a misdemeanor which shall be punishable, upon conviction, by a fine of not less than one hundred fifty dollars nor more than two hundred dollars.

Sec. 28-91. *Permit required, posting.*

(a) It shall be unlawful for any person to own, operate, manage or conduct any business in an adult arcade unless there is a permit for the adult arcade.

(b) It shall be unlawful for any person to own, operate, manage or conduct any business in an adult arcade unless the permit is posted at the place designated therefor. . . .

Sec. 28-101. *View from manager's station.*

(a) If an adult arcade has one manager's station designated pursuant to section 28-92(c) of this Code, then the interior of the adult arcade shall be configured in such a manner that there is an unobstructed view of every area of the adult arcade to which any patron is permitted access for any purpose from that manager's station. If an adult arcade has two or more manager's stations designated pursuant to section 28-92(c) then the interior of the adult arcade shall be configured in such a manner that there is an unobstructed view of each area of the adult arcade to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(b) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in an adult arcade to ensure that the view area specified in subsection (a) remains unobstructed by any merchandise, display racks or

other materials at all times that any patron is present in the adult arcade and to ensure that no patron is permitted access to any area of the adult arcade which has been designated as an area in which patrons will not be permitted in the plan filed pursuant to section 28-92(c) of this Code.

Sec. 28-102. *Lighting*

(a) Each adult arcade shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) foot candle as measured at the floor level.

We note the general rule that, in passing upon the constitutionality of a statute, we begin with a presumption of validity. We presume that the legislature does not act unreasonably or arbitrarily; thus, the burden is on whoever challenges an act to establish its unconstitutionality. *Spring Branch Indep. School Dist. v. Stamos,* 695 S.W.2d 556, 558 (Tex. 1985); *Robinson v. Hill,* 507 S.W.2d 521, 524 (Tex. 1974).

A. Whether the Ordinance is Overbroad

We address the overbreadth challenge first because, in a facial challenge based on overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If the law does not reach a substantial amount of constitutionally protected conduct, the overbreadth challenge must fail, and the court should then examine the facial vagueness challenge. *Village of Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. at 494-95, 102 S. Ct. at 1191.

Appellant argues that the Ordinance is impermissibly overbroad in four ways: (1) that sec. 28-101(a) prevents

the sale of any literature, regardless of its content, in an adult arcade because the requirement that the arcade be configured to provide an unobstructed view of every area within the arcade cannot be satisfied without substantial economic impairment to both protected and unprotected activities; (2) that the end result of the Ordinance is a prohibition on the operation of a business based upon the content of the various forms of expression exhibited by the business; (3) that the Ordinance criminalizes land ownership; and (4) that the Ordinance purports to penalize any person who "conducts any business" within a building that houses arcade devices.

[1] A statute or ordinance, even if clear and precise, is overbroad if in its reach it prohibits constitutionally protected conduct. *Grayned v. City of Rockford,* 408 U.S. 104, 114, 92 S. Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). This broad statement of law, however, is tempered by two corollaries. First, for a facial challenge to succeed, the enactment must reach a *substantial amount* of protected conduct. *Village of Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. at 494, 102 S. Ct. at 1191. Second, even protected speech may be regulated to some degree by the State. *Young v. American Mini Theatres,* 427 U.S. 50, 70-71, 96 S. Ct. 2440, 2452-2453, 49 L.Ed.2d 310 (1976). Finally, we observe that there is a "less vital interest in uninhibited exhibition of material on the borderline between pornography and artistic expression than in free dissemination of ideas of social and political significance." *Id.,* 427 U.S. at 61, 96 S. Ct. at 2448.

Addressing appellant's complaint about the Ordinance's internal configuration requirement, appellant's claim that compliance requires the removal of all display devices,

as well as the bulk of his inventory, is exorbitant and without merit. *See Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. at 495-96, 102 S. Ct. at 1191-92 (terming "exorbitant" the claim that the restriction in issue made the sale of all products on premises tainted with illegality and, therefore, impossible). No restriction is imposed upon access to the arcade, nor upon the content of the film. The Ordinance does not require the use of fewer arcade devices, limit the number of persons viewing the films, nor reduce the number of film titles that may be shown. The Ordinance "merely requires conformity to its provisions for a visible interior." *People v. B & I News, Inc.*, 164 Cal. App. 3d Supp. 1, 6, 211 Cal. Rptr. 346, 349 (1984) (quoting *DeMott v. Board of Police Comm'rs*, 122 Cal. App. 3d 296, 302, 175 Cal. Rptr. 879, 883 (1981)).

[2] Although the Ordinance does require some inconvenience in arranging a purveyor's wares—both those protected by the First Amendment and those not—we find that it does not reach a *substantial amount* of protected conduct. *Martinez v. State*, 744 S.W.2d 224, 227-28 (Tex. App.—Houston [14th Dist.] 1987, pet. ref'd, untimely filed); *People v. B & I News*, 164 Cal. App. 3d Supp. at 6, 211 Cal. Rptr. at 349 ("the ordinance before us does not prevent customers and others from exercising the right to view motion pictures in arcades. . . .").

As for any slight inconveniences in arranging inventory, incidental burdens on free expression are analyzed as time, place, and manner regulations. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 928, 89 L.Ed.2d 29 (1986). Time, place, and manner restrictions are permissible if they are content-neutral, narrowly tailored to serve a significant government in-

terest, and leave open ample alternative channels for communication. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L.Ed.2d 221 (1984); *Ellwest Stereo Theatres v. Wenner,* 681 F.2d 1243, 1245-46 (9th Cir. 1982).

Applying the "time, place, manner" test, we note first that the Ordinance is content-neutral. Although it does specifically apply to adult arcades that dispense a certain type of entertainment ("specified sexual activities"), it is directed at the *secondary effects* of adult arcades (these effects are enumerated in the City Council's findings, as incorporated by the Preamble of the Ordinance). *City of Renton v. Playtime Theatres,* 106 S. Ct. at 929 ("the Renton ordinance is aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theaters . . ."). Therefore, the Ordinance does not discriminate *because of* the content of the entertainment purveyed.

Second, as to the requirement that the government's interest be significant, the Preamble to the Ordinance attests to the importance and substantiality of the governmental interest. The Preamble reflects that the City Council conducted a public hearing on the relation between public health, safety, and welfare issues, and adult arcades. The Preamble recites the Council's finding that "the booths in the adult arcades have frequently been used for sexual encounters including those of a casual nature; and that substantial numbers of arrests for sexually related crimes have been made in adult arcade establishments." The Council further found that "numerous persons treated for sexually transmitted diseases have reported an epidemiology including sexual encounters in

adult arcades." These findings bear witness to serious public health and welfare concerns that would motivate any city council to act similarly.

A city may establish its interest in the regulation by compiling a record with evidence that may be "reasonably believed to be relevant to the problem that the city addresses." *City of Renton v. Playtime Theatres*, 106 S. Ct. at 931; *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988). Given the comprehensive and serious nature of these findings, we conclude that the City was reasonable in its reliance.

Addressing the requirement that the Ordinance be narrowly tailored, we observe that the Ordinance is drafted to limit itself to a specific business environment and to regulate the configuration of that environment, not in terms of what is purveyed, but in terms of the visibility of patrons. An ordinance is sufficiently "well tailored" if it effectively promotes the government's stated interest without infringing significantly upon protected conduct. *SDJ, Inc. v. City of Houston*, at 14. The City drafted an ordinance to control problems it found to be serious. The Ordinance does not encompass much beyond those problems: it does not limit who has access to an adult arcade, nor the content of films dispensed; it places no restrictions upon the number of films shown, nor the hours during which films are shown. We find the Ordinance to be sufficiently well tailored.

Finally, we find that the Ordinance leaves open ample alternative channels for communication. The only actual effect of this Ordinance is that patrons of adult arcades will be required to peruse openly, under specified minimum lighting, the entertainment provided. Thus, ample

alternative channels are left open because none were ever really closed.

The above analysis demonstrates that the Ordinance encroaches upon protected conduct, if at all, in a constitutionally permissible fashion. *See Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d at 1247-48 (holding that a municipal ordinance requiring that viewing areas of booths in which coin operated devices are located be visible from a continuous main aisle was a reasonable regulation of the manner in which film was to be viewed); and *Wall Distrib., Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986) (holding that an ordinance making it a criminal offense to exhibit films in enclosed booths is a valid "time, place, and manner" regulation).

[3] However, even if the Ordinance did reach a substantial amount of protected conduct, it would still be constitutional, because it satisfies the four-part test of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 1679, 20 L.Ed.2d 672 (1968); *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1069 (N.D. Tex. 1986), *aff'd*, 837 F.2d 1298 (5th Cir. 1988).

Under the *O'Brien* test, regulation is justified despite its impact on first amendment interests:

> [1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on . . . first amendment freedoms is no greater than is essential to the furtherance of that interest.

Dumas v. City of Dallas, 648 F.Supp. at 1069 (quoting *United States v. O'Brien,* 391 U.S. at 377, 88 S. Ct. at 1679).

Applying the first prong of the *O'Brien* test, we conclude that the police power of a city clearly encompasses the power to enact a regulatory adult arcade ordinance. *City of Renton v. Playtime Theatres,* 106 S. Ct. at 930, 932; *Dumas v. City of Dallas,* 648 F.Supp. at 1069; *City of College Station v. Turtle Rock Corp.,* 680 S.W. 2d 802, 805 (Tex. 1984).

As for the second prong, the City Council's findings, as enumerated in the Preamble, underscore the seriousness of the governmental interest. *See* our "time, place, and manner" analysis *supra.*

Regarding the third prong, we can discern no evidence linking the government's interest to suppression of free expression. Indeed, the language of the Ordinance evinces great concern for regulating the *display* of literature, which indicates the City's goal to be that free expression remain unimpaired. *See Dumas v. City of Dallas,* 648 F.Supp. at 1069 ("[t]he legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community").

The final prong of the *O'Brien* test requires reference to the challenged section of the Ordinance. *Dumas v. City of Dallas,* 648 F.Supp. at 1069-70. We find that any restriction on first amendment freedoms that might result from the enforcement of any of the Ordinance's sections is no greater than is essential to the furtherance of the governmental interests involved. (*See* the reasons

stated in our "time, place, and manner" analysis *supra.*) Supporting our conclusion are cases from various jurisdictions upholding similar restrictions. *See, e.g., Ellwest Stereo Theatres v. Wenner,* 681 F.2d at 1246; *Dumas v. City of Dallas,* 648 F.Supp. at 1076; *Broadway Books, Inc. v. Roberts,* 642 F.Supp. 486, 492 (E.D. Tenn. 1986); *Martinez v. State,* 744 S.W.2d at 227-28; and *EWAP, Inc. v. City of Los Angeles,* 97 Cal. App. 3d 179, 190, 158 Cal. Rptr. 579, 585-86 (1979).

Addressing appellant's three remaining arguments in support of his overbreadth claim, we note that the State need define a criminal offense only with sufficient definiteness so that ordinary people can understand what conduct is prohibited. *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). Ordinary terms in a statute or ordinance are construed according to their common usage or understanding. *Sproles v. Binford,* 286 U.S. 374, 393, 52 S. Ct. 581, 586, 76 L.Ed. 1167 (1932); *City of Webster v. SignAd. Inc.,* 682 S.W.2d 644, 647 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Although these standards traditionally are employed in a "vagueness analysis," because they are general rules of interpretation, we apply them to determine the objective meaning of the Ordinance. Using these legal standards, we find that appellant's arguments are based on an incorrect reading of the Ordinance, that the Ordinance is precise in its language and limited in its reach. The Ordinance is not overbroad.

[4] Regarding appellant's contention that the wording of the Ordinance is so broad that the lighting requirement could reach non-adult theaters, we find that the Ordinance clearly regulates only those forms of expression dispensed

in arcade booths. The Ordinance applies to "adult arcades" that "dispense" "entertainment" by "arcade devices." By its explicit terms, then, the Ordinance does not reach forms of expression dispensed in a traditional auditorium and therefore is not overbroad in its lighting requirement. *Martinez v. State*, 744 S.W.2d at 227 (and cases cited therein).

[5] Appellant's argument that the Ordinance criminalizes land-ownership is incorrect. The Ordinance clearly states that it prohibits the "owning, operating, managing or conducting of business *in* an adult arcade." (Emphasis added.) The Ordinance defines an "adult arcade" as a "premises," and a "premises" as a "building." Therefore, the Ordinance prohibits only certain activities *within* an adult arcade, and *not* the ownership of the building that houses the adult arcade. *See Martinez v. State*, 744 S.W. 2d at 227-28.

[6] Finally, appellant's argument that the Ordinance is unconstitutional because it penalizes "any business" conducted within an arcade, fails. The phrase in section 28-91 upon which he bases this claim is "conduct any business." Although this phrase would appear all encompassing, section 28-83 states that "[t]he provisions of this article are supplemental and shall be cumulative with all other laws and ordinances applicable in any manner to an adult arcade or to any owner . . . thereof."

We observe that art. III, ch. 28, Code of Ordinances of the City, which applies to sexually oriented businesses in general, of which adult arcades are an example, contains a very specific definition of "conduct any business." This definition precludes the broad construction of section 28-91 argued by appellant. *Id*. The rule is that an ordi-

nance should not be deemed facially invalid unless it is not readily subject to a narrowing construction. *Tisdale v. State*, 640 S.W.2d 409, 415 (Tex. App.—San Antonio 1982, pet. ref'd). We find that the Ordinance, when *read in its entirety*, does not penalize the conduct of "any" conceivable business that might take place in an adult arcade and should be so construed.

The county court did not err in overruling appellant's overbreadth challenge.

B. Whether the Ordinance is Vague

The traditional standard of unconstitutional vagueness is whether the terms of a statute are so indefinite that "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620, 96 S. Ct. 1755, 1760, 48 L.Ed.2d 243 (1976); *see also Texas Antiquities Comm. v. Dallas County Community College Dist.*, 554 S.W.2d 924, 928 (Tex. 1977); *Texas Liquor Control Bd. v. The Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970). In reviewing a business regulation for facial vagueness, the principal inquiry is whether the law affords fair warning of what is proscribed. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. at 503, 102 S. Ct. at 1195.

With these standards of review in mind, we turn to the specific provisions of the Ordinance to which appellant objects. Appellant urges that the definitions of "adult arcade," "dispensing entertainment," and "arcade device" are so open-ended and imprecise that the Ordinance provides virtually no ascertainable legal standard at all.

Appellant also argues that the requirement of section 28-101(a), *viz.*, that from the manager's station there shall be "an unobstructed view of every area of the adult arcade to which any patron is permitted," provides too subjective a standard—that it does not provide fair notice of what words or conduct would come within its prohibition. He argues that too much discretion is left with the Chief of Police to determine what constitutes "an unobstructed view."

[7] Appellant's contention that "adult arcade" is so vague in its definition that a person of ordinary intelligence would be unable to decide whether the prohibition of the Ordinance is against owners of buildings or owners of businesses fails because the Ordinance is clear in its meaning and gives fair and adequate warning of what it proscribes. The Ordinance prohibits, upon failure to comply with its requirements, owning, operating, managing, or conducting *business* in an adult arcade. If one reads the permit requirement provision of the Ordinance together with the definition of "adult arcade," it is clear that the phrase "adult arcade" limits the scope of the Ordinance to that part of a building occupied by an adult arcade. In other words, it is unlawful, under the Ordinance, to own, operate, manage, or control an adult arcade—which may encompass an entire building or only a portion thereof. *See Martinez v. State*, 744 S.W.2d at 227-28. We find that the Ordinance is clear in its meaning.

We also are unpersuaded by appellant's argument that the language of the Ordinance confers virtually unlimited discretion on the appointed enforcement officials to determine what constitutes an "adult arcade." The police have virtually no discretion in determining what constitutes an

"adult arcade" because, contrary to appellant's contentions, the Ordinance is exacting and precise in its definitions, permit application, and denial provisions. Section 28-92, entitled *"Permit application,"* and sec. 28-93, entitled *"Issuance or denial by police chief,"* require that the Chief of Police *shall* grant a permit, if the conditions precedent are met. This statement of the law does not entrust enforcement "to a policeman's command," as proscribed by the Supreme Court. *See Gregory v. City of Chicago,* 394 U.S. 111, 120, 89 S. Ct. 946, 951, 22 L.Ed.2d 134 (1969) (concurring opinion).

[8] Appellant contends that the Ordinance is unclear in its use of "dispense"; however, when we apply the standard meaning of the word in interpreting the statute, we find that the Ordinance is quite clear in what it provides. A dictionary defines "dispense" as "to deal out in portions" and/or "to prepare and distribute." *Webster's New Collegiate Dictionary* 326 (1981). The prohibition against vagueness does not invalidate every enactment that could have been drafted with greater precision. *Harper v. Lindsay,* 616 F.2d 849, 857 (5th Cir. 1980). This portion of the Ordinance is understandable by men of ordinary intelligence. *Martinez v. State,* 744 S.W.2d at 226.

Appellant's third contention with the Ordinance is directed to its definition of "arcade device." The Ordinance defines an "arcade device" as "any coin . . . operated . . . device . . . that dispenses . . . entertainment, that is intended for the viewing of five or fewer persons. . . ." Appellant argues that the Ordinance is vague because it does not state whose intent is relevant; because it does not specify the relevant time frame within which viewing

by five or fewer persons must occur, and because it is unclear as to whether a film or the device itself is the object of the phrase "intended to be viewed."

We find that the common usage and understanding of the phrase, in the context used, makes clear that the phrase refers to devices whose design reflects a general intent (*i.e.*, of either or both the manufacturer and/or the adult arcade owner) that they be used to dispense films to five persons or less. Furthermore, because of its lack of a time reference, the phrase "viewing by five or fewer persons" implicitly refers to that number of persons *at a given time. Martinez v. State,* 744 S.W.2d at 227. Finally, it is obvious that the Ordinance regulates the manner in which persons view *what the device dispenses,* not with how they view the device itself.

Ordinances of other jurisdictions, which contain similar "five or fewer persons" provisions, have been uphled against this type of constitutional attack. *See, e.g., Wall Distrib., Inc. v. City of Newport News,* 782 F.2d at 1169; *Dumas v. City of Dallas,* 648 F.Supp. at 1061; *Martinez v. State,* 744 S.W.2d at 227; and, *Walnut Properties, Inc. v. Long Beach City Council,* 100 Cal. App. 3d 1018, 1024, 1025, 161 Cal. Rptr. 411, 415, 416 (1980). A city need not pass guidelines to clarify every possible ambiguity in order to defeat a facial challenge to an ordinance. *See Martinez v. State,* 744 S.W.2d at 227.

[9] Appellant's final vagueness challenge is leveled at the "unobstructed view" requirement, arguing that the phrase, if taken literally, could lead to arbitrary and/or discriminatory enforcement. If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *Grayned*

v. City of Rockford, 408 U.S. at 108, 92 S. Ct. at 2298. We find that the Ordinance provides this type of explicit standard. The permit application and denial provisions, when coupled with the "unobstructed view standard," are sufficient to prevent arbitrary or discriminatory enforcement by the police. The police are afforded limited and controlled discretion under the Ordinance; the police chief *shall* grant the permit if the relevant requirements are met.

The county court did not err in overruling appellant's vagueness challenge.

C. Whether the Ordinance Is an Impermissible Prior Restraint on Free Speech

[10] Appellant's third point of error raises the issue of whether the Ordinance constitutes an impermissible prior restraint on free speech and, therefore, violates due process of law. Appellant argues that the configuration requirements of the Ordinance constitute the sort of prior restraint condemned by both Federal and Texas courts. *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 76, 101 S. Ct. 2176, 2186, 68 L.Ed.2d 671 (1981); *Iranian Muslim Org. v. City of San Antonio,* 615 S.W. 2d 202, 205 (Tex. 1981).

At the same time, appellant acknowledges that certain restraints, prior or otherwise, are constitutionally permissible. *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553, 95 S. Ct. 1239, 1243, 43 L.Ed.2d 448 (1975); *Ellwest Stereo Theaters, Inc. v. Wenner,* 681 F.2d 1243, 1247 (9th Cir. 1982). In assessing the propriety of a law that acts as a prior restraint, courts have held permit systems to be unconstitutional prior restraints on free expression *only* if they give virtually unlimited

discretion to an administrative official to grant or deny a permit or if they have standards for granting or denying the permit that are so vague that they authorize virtually standardless censorship. *Schope v. State,* 647 S.W.2d 675, 680 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd); *see Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. at 560-62, 95 S. Ct. at 1247-48. We find that neither circumstance applies in the instant case for the reasons elaborated in our opinion *supra.* Courts have overruled prior restraint challenges to statutes similar to the Ordinance in question here. *Dumas v. City of Dallas,* 648 F.Supp. at 1077-78; *Martinez v. State,* 744 S.W.2d at 228; and *EWAP, Inc. v. City of Los Angeles,* 97 Cal. App. 3d at 189-90, 158 Cal. Rptr. at 585.

Because we have found that the permit system has a precise and reasonably ascertainable standard, we hold that the county court did not err in overruling appellant's prior restraint challenge.

We overrule appellant's first three points of error.

D. Preemption Challenges

In his fourth and fifth points of error, appellant claims that the Ordinance is preempted by Tex. Rev. Civ. Stat. Ann. arts. 2372w, 8814, and 8817 (Vernon Supp. 1986). Because appellant failed to include these points of error in his motion for new trial before the municipal court, however, these points are waived. Tex. Govt. Code Ann. secs. 30.269(c), 30.278 (Vernon Pamph. 1988). *Martinez v. State,* 744 S.W.2d at 228.

We hold that the county court did not err in overruling appellant's preemption challenges.

We overrule appellant's fourth and fifth points of error.

The judgment is affirmed.